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IN THE

# Supreme Court Of The United States

No. 483

PEARL DETENBER, Administratrix of the estate of Terry Detenber, deceased
and
VIOLA B. TOWNSEND, Administratrix of the estate of Richard Mattingly, deceased - Petitioners

*vs.*

AMERICAN UNIVERSAL INSURANCE CO. - Respondent

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SIXTH CIRCUIT

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IN THE

# SUPREME COURT OF THE UNITED STATES

No. ———

PEARL DETENBER, Administratrix of the estate of Terry Detenber, deceased
and
VIOLA B. TOWNSEND, Administratrix of the estate of Richard Mattingly, deceased - - - - - *Petitioners*

*vs.*

AMERICAN UNIVERSAL INSURANCE CO. - *Respondent*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your Petitioners, Pearl Detenber, Administratrix of the estate of Terry Detenber, deceased, and Viola B. Townsend, Administratrix of the estate of Richard Mattingly, deceased, respectfully pray that a writ of certiorari issue from this court, in the above entitled action, to review a final decision of the United States Court of Appeals for the Sixth Circuit rendered on

February 9, 1967, a petition for rehearing having been denied on April 12, 1967.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported in 372 F.2d 50. It was rendered and filed on February 9, 1967, and is printed in its entirety in Appendix "A" hereto, at pages 12–18. The petition for rehearing was filed March 28, 1967, and denied on April 12, 1967.

The judgment of the District Court was entered on March 9, 1965, directing the dismissal of petitioners' complaints and is printed in its entirety in Appendix "B" hereto at pages 19–21.

## JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals with respect to which the writ of certiorari is sought was entered on February 9, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

## THE QUESTIONS PRESENTED

1. Does the judgment of the Court of Appeals affirming the judgment of the District Court granting respondents a summary judgment violate the provisions of Rule 56(c) of the Federal Rules of Civil Procedure?

2. If respondent insurer supplies its insured with counsel, who, while acting as insured's lawyer in an

automobile guest action, attacks the insured and openly charges his client with drunkenness and reckless driving, despite the testimony of his client to the contrary, is there an issue of fact as to respondent's negligence or lack of good faith, in the conduct of the client's trial before a jury?

## RULES INVOLVED

The rule involved in this appeal is Rule 56(c) of the Federal Rules of Civil Procedure, which is printed in Appendix C, infra, at page 21.

## STATEMENT

This matter grew out of a trial in a State Court in Kentucky, which in turn grew out of a vehicular accident. Terry Detenber, 15, and Richard Mattingly, 14, were passengers in an automobile driven by Michael Clark, 18, which was involved in a collision with a bus owned and operated by the Louisville Transit Company. The collisions resulted in the deaths of Detenber and Mattingly and their administrations brought the state court action against Clark and the transit company. Throughout most of the settlement negotiations prior to trial representatives of the respondent, Clark's insurer, urged a want of actionable negligence on Clark's part, as did Clark by statements given to respondent, and by depositions made by said Clark in pre-trial depositions in the State Court proceedings. The record in the present action contains a statement of Clark that

he went into the state court trial with the understanding from the respondent that the defense would be want of negligence on his part, and that the transit company was solely responsible for the collision.

During pre-trial negotiations and proceedings in said state court action, Clark had been represented by personal counsel and by an insurance company attorney. On the day of the trial a different insurance company lawyer filed an amended answer alleging that Clark's passengers assumed the risk of riding with him. Respondent's position that the accident was solely caused by the transit company was abandoned and every effort was made by respondent's lawyer to put Clark (his client) in as bad a light as possible, and he contended throughout the trial that Clark (his client) had been drinking and driving recklessly. Clark was not advised of his change in defense, and did not agree to it prior to, or during the trial. The change of defense was not discussed with Clark's personal attorney.

Respondent's lawyer relentlessly attacked Clark throughout the state court trial, both before the jury in open court, and in chambers before the Judge, although he was his lawyer. By examination, cross-examination and in final argument respondent's lawyer stressed not only that negligence on Clark's part proximately resulted in the principal accident, but also his negligent operation prior thereto. He totally ignored Clark's testimony to the contrary and asked the jury not to believe him. He also permitted evi-

dence that Clark had been indicted for voluntary manslaughter (a felony in Kentucky) to be received in evidence without objection or explanation; whereas in fact, Clark's plea of guilty was to the offense of negligent homicide (a misdemeanor in Kentucky). Respondent's lawyer's acts in this respect were in contravention of an agreement with Clark's personal attorney, under which it was agreed that Clark would have an opportunity to explain his plea of guilty to negligent homicide if it was proven. No explanation has ever been offered concerning failure of respondent's attorney to discuss fully with his then client the alternative defenses available to him and the significance of the filing on the day of the trial of the amended answer, or even to advise Clark of the fact of such filing. The result of the state court trial was a verdict assessing 90 per cent of the damages against Clark and 10 per cent against the transit company.

The limit of the insurance policy issued by respondent providing coverage to Clark was $10,000.00, and that entire sum (after payment of a small amount in settlement of two bus passengers' claims) was applied on the Detenber, Townsend and Ross judgments. The transit company paid its 10 per cent and there remained an unpaid balance in excess of $24,000.00 in each of the judgments favoring Detenber and Townsend. In exchange for a complete release, as to these unpaid balances, Clark assigned to the petitoners herein his claim against the respondent for negligence in the conduct of the trial of his

case, and for having acted without good faith and in bad faith to him in the state court trial. The petitioners brought action in the District Court leading to the filing of cross motions for summary judgment before the Honorable District Court Judge Henry Brooks. Petitioners' motion for summary judgments was overruled, and respondent's motion for summary judgment was sustained with entry of judgment thereunder.

Respondents appealed from the ruling of Judge Brooks, and the United States Court of Appeals for the Sixth Circuit on February 9, 1967, rendered a decision affirming the judgment entered by Judge Brooks. A petition for rehearing was denied on April 12, 1967. The mandate of the Court of Appeals has been stayed pending petitioners' application for a writ of certiorari.

## REASONS FOR GRANTING THE WRIT

### 1. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN SARTOR v. ARKANSAS NATURAL GAS CORP., UNITED STATES v. DIEBOLD, INC., AND WHITE MOTOR CO. v. UNITED STATES, UNDER RULE 56(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

This Court gave its interpretation of Rule 56(c) in the case of Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627, 64 S.Ct. 724, 88 L.ed. 967, and said:

> "The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try."

In the case of United States v. Diebold Incorporated, 369 U.S. 654, 82 S.Ct. 993, 8 L.ed. 2d 176, this Court further stated that on motion for summary judgment under Rule 56(c), the inferences to be drawn from the underlying facts contained in such material as affidavits, attached exhibits and depositions must be viewed in the light most favorable to the party opposing the motion.

In the case of White Motor Co. v. United States, 372 U.S. 253, 83 S.Ct. 696, 9 L.ed. 2d 738, this Court has stated that summary judgment is not appropriate where motive and intent play leading roles.

As more fully stated hereafter, the decision below conflicts with the principles asserted in these cases.

**2. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE PROVISIONS OF RULE 56(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE AS INTERPRETED AND APPLIED BY OTHER DECISIONS OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.**

In the case of S. J. Groves & Sons Co. v. Ohio Turnpike Commission (CA 6th) 315 F.2d 235, cert.

denied 375 U.S. 824, 84 S.Ct. 65, 11 L.ed. 2d 57, the Court denied the propriety of a summary judgment even where the facts are not in dispute, where the parties may in good faith disagree about inferences to be drawn from the facts and added:

> ". . . a party should not be deprived of an adequate opportunity to fully develop his case by witnesses and a trial, when the issues involved make such procedure the appropriate one."

The Court of Appeals for the Sixth Circuit in the foregoing opinion cited the Supreme Court cases of Sartor v. Arkansas Gas Corp., and White Motor Co. v. United States, supra.

Other decisions of the Court of Appeals for the Sixth Circuit following the rule in the above Supreme Court cases are:

Knapp v. Kinsey, 249 F.2d 797
Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425
Begnaud v. White, 170 F.2d 323
Estepp v. Norfolk & W. Ry. Co., 192 F.2d 889
Bellak v. United Home Life Ins. Co., 211 F.2d 280
Hoy v. Progress Pattern Co., 217 F.2d 701

The decision below conflicts with the Sartor, Diebold, and White Motor Co. cases decided by this Court and the cited decisions of the Court of Appeals for the Sixth Circuit, whatever view may be taken as to the applicable state law. The complaints here allege negligence and the failure to exercise good faith and charge respondent with acting adversely to the in-

sured's interest in the defense of his state court trials. The actions of the attorney supplied by the respondent insurer, set out in the transcript of the proceedings of the state court actions and the other papers before the courts below, upon the motions for summary judgment, raise substantial issues of fact related to the requirement of the insurer to exercise ordinary care in conducting the defense it was under duty to provide. Ballard v. Ocean Accident & G. Co., (CA 7th), 86 F.2d 449; Attleboro Mfg. Co. v. Frankfort Marine Acc. Ins. Co. (CA 1st), 240 F. 573. There is an issue as to the failure of respondent's attorney to withdraw from the defense of the state court trials rather than to proceed with hostility to his client. There is a substantial issue as to whether respondent insurer gave as much consideration to the financial well-being of the insured as it did to its own interest. There is substantial issue as to whether respondent's counsel exercised the same high standards which govern all lawyers, whether or not privately retained, in his conduct of the defense of the insured.

Moreover, these issues of fact relate equally to the question of the respondent's want of good faith, if the law of Kentucky is, as the lower court held, that recovery will lie only if failure to exercise good faith is established. Good faith is defined by the Kentucky Court of Appeals in its most recent decision of Roehrig v. Merchants and Businessmens Mutual Insurance Company (Ky., 1965), 391 SW 2d 369, 371 as follows:

> "What is the meaning of 'good faith' as that expression applies to the facts presented? It can be, and usually is, something less than perfection or complete accuracy. Above all it means not to take advantage of, not to deceive, not to be underhanded. Black's Dictionary states on this point: 'Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information, notice, or belief of facts which would render the transaction unconscientious'."

In order to affirm the District Court's award of summary judgment the Court of Appeals was required to hold that the conduct of counsel for Clark could not constitute lack of good faith as a matter of law. Because the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing a motion for summary judgment and because summary judgment is not appropriate where motive and intent play leading roles, the Court below could not properly make such a holding.

In this connection, the following language of the opinion of the Court of Appeals seems significant:

> "While such failure is felt by this court to be reprehensible, our consideration in the present situation must be directed to legal, not ethical issues. We emphasize the fact that nothing stated in the course of this opinion is to be read as condoning counsel's lack of communication to his client."

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

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## APPENDIX "A"

PEARL DETENBER
Administratrix of the Estate
of Terry Detenber, Deceased - Plaintiff-Appellant

v.

AMERICAN UNIVERSAL
INSURANCE CO. - - Defendant-Appellee

VIOLA B. TOWNSEND,
Administratrix of the Estate
of Richard Mattingly,
Deceased - - - - Plaintiff-Appellant

v.

AMERICAN UNIVERSAL
INSURANCE CO. - - Defendant-Appellee

Appeal from the United States District Court
for the Western District of Kentucky

United States Court of Appeals
Sixth Circuit
Nos. 16728, 16729
Feb. 9, 1967

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Before EDWARDS and PECK, Circuit Judges and FOX, District Judge.

JOHN W. PECK, Circuit Judge.

Having upon motion been consolidated by the District Court, these actions were there and will here on this appeal be considered as a single case.

The present controversy grew out of a trial in a state court in Kentucky, which in turn grew out of a vehicular accident. Terry Detenber, 15, Richard Mattingly, 14, and a Patricia Ross were passengers in an automobile driven by Michael Clark, 18, which was involved in a collision with a bus owned and operated by the Louisville Transit Company. The collision resulted in the deaths of Detenber and Mattingly, and their administratrices and Miss Ross brought the state court action against Clark and the Transit Company. A verdict assessing damages in favor of each plaintiff was returned, the verdict further making an apportionment of the damages 90% against Clark and 10% against the transit company. The transit company satisfied its portion of judgments entered on the verdict and is not a party to the present action. Similarly, we are not here concerned with the judgment in favor of Patricia Ross.

Throughout most, if not all of the settlement negotiations, prior to trial representatives of the present defendant, Clark's insurer, urged a want of actionable negligence on his part. Clark subsequently testified (in the present action) that he went into that trial with the understanding that the defense would be want of negligence on his part, and that the transit company was solely responsible for the collision.

During pre-trial negotiations and proceedings Clark had been represented by personal counsel and by an insurance company attorney, but on the day of trial another of the defendant insurance company's lawyers appeared as sole trial counsel. On that day he filed an amended answer in which it was alleged that Clark's three passengers assumed the risk of riding with him, and the case proceeded through trial

on that defense. As will be hereinafter more fully indicated, not only was the position that the accident was solely caused by the transit company abandoned but every effort was made to put Clark in as bad a light as possible, his trial attorney claiming that he had been drinking and was driving recklessly. Clark was not advised of this change in defense and did not agree to it either prior to or during the trial. Similarly, the change of defense was not discussed with Clark's personal attorney, and he had not read a copy of the amended complaint with which he had been provided.

The limit of the policy issued by the defendant providing coverage to Clark was $10,000 and that entire sum (after payment of a small amount in settlement of two bus passengers' claims) was applied on the Detenber, Townsend and Ross judgments. After the payment of such sums, and of those paid by the transit company, there remained an unpaid balance in excess of $24,000 on each of the judgments favoring Detenber and Townsend. In exchange for a complete release as to these unpaid balances, Clark assigned to the plaintiffs in the state court action and here his claim against the defendant for having acted without good faith and in bad faith to him in the state court trial. They brought action in the District Court, leading ultimately to a filing of crossed motions for summary judgment. Plaintiffs appeal from the overruling of their such motion, and from the sustaining of defendant's motion and entry of judgment thereunder.

There can be no doubt of the relentlessness of the attack made upon Clark during the state court trial by the insurance company attorney ostensibly defending him. In a chambers conference prior to the

opening of that trial, he made this statement: "The sole defense available to the Clark boy in this case is the defense of assumed risk, and if (plaintiffs' counsel) doesn't prove, I am going to prove that these young people got in the car, they knew that the driver was drinking, they knew he had done it on other occasions, that they went down the street and actually had physical possession of whiskey in the back. I am going to produce a witness that saw them driving erratically, weaving, at 50 miles an hour, they struck a parked car approximately nine blocks from the scene of this accident, * * * they didn't stop after having that accident, but they fled from the scene of that accident to the scene of this one, and I say to you that when young people of the age of 15 and 17, of that age, under the law with the Court of Appeals, when they get into a car in which there is drinking —there is no claim this young man was drunk, but I have got a drinking case—when the car is being driven in a reckless manner, and riding in that car, and I don't know what is more reckless than hitting a car and keeping on going, and I will say to you they assume the risk."

In a course of action consistent with his Chambers' statement, defense counsel throughout trial, by examination, cross-examination and final argument stressed not only that negligence on Clark's part proximately resulted in the principal accident, but also his negligent operation prior thereto. He also permitted evidence of Clark's conviction on a plea of guilty of voluntary manslaughter as a result of the death of the Detenber and Mattingly boys to be received in evidence without objection or explanation. This apparently was in contravention of an agreement with Clark's personal

attorney, under which it was agreed that Clark would have an opportunity to explain this plea if it were proven.

No satisfactory explanation has ever been offered concerning the failure of the present defendant's attorney to fully discuss with his then client, Clark, the alternative defenses available to him and the significance of the filing on the day of trial of the amended answer—or to even advise him of the fact of such filing. While such failure is felt by this Court to be reprehensible, our considerations in the present situation must be directed to legal, not ethical, issues. We emphasize the fact that nothing stated in the course of this opinion is to be read as condoning counsel's lack of communication to his client.

The first of the two legal issues is whether the defendant insurance company's attorney is guilty of bad faith in his representation of Clark, the company's insured. The record of the trial in the state court clearly established that prior to trial the insurance company offered settlement in the full amount of its coverage ($10,000.00), and that this offer was repeated during the trial. Thus it might first appear that it had nothing to gain and could only incur expense by proceeding through trial, and that its attorney's only objective was to protect Clark by keeping the verdict as close as possible to the policy limit. As reflection will quickly indicate, this is not the whole story and it may be at least as plausibly argued that the assumption of risk defense was adopted as the only course which could benefit the insurance company; specifically, it could save the company its $10,000. On the other hand, it was a defense more fraught with danger for Clark than for the company, since if it found

liability a jury inflamed by accusation of his carelessness and of driving while under the influence of alcohol would scarcely incline to a niggardly verdict. Further, having his own lawyer join with those for the plaintiffs and the Transit Company in placing such blame on him could have played a part in the jury's determination that Clark should pay 90% of the damages.

Persuasive as such considerations might be in other jurisdictions, the law of Kentucky on the point at issue seems to have been clearly established in American Surety Co. v. J. F. Schneider & Son, 307 SW 2d 192 (Ky. 1957). Therein the highest court of Kentucky once more recognized the duty of an insurer to exercise the upmost good faith and the corollary that action in bad faith or failure to exercise good faith is sufficient to create liability on the part of the insurer for the excess of a verdict beyond policy limits, but that court specifically held that: "Mere errors of judgment are not sufficient to constitute bad faith." Id. at 195. Again, the court in Harrod v. Meridian Mutual Ins. Co., 389 SW 2d 74, 76 (Ky. 1964), stated that bad faith "is not simply bad judgment. It is not merely negligence. * * * It implies conscious doing of wrong. * * * It partakes of the nature of fraud." See also, Georgia Casualty Co. v. Mann, 242 Ky. 447, 46 SW 2d 777 (1932).

Although capable of being discounted as self-serving declarations, in fairness to defense counsel, since the negative aspects to Clark of the defense adopted have been emphasized, certain of his statement should not go unnoticed. Defense counsel initially and repeatedly stated that in his professional opinion assumption of risk (contributory negligence) was the best and only defense available to Clark, and

in other ways, such as in connection with Clark's driving rights, he made pointed effort to afford protection.

It was the view of the District Court, as expressed in its Judgment, that "In view of the substantial evidence of drinking on the part of * * * Clark, and of the introduction in evidence in the state court action of his plea of guilty to a criminal charge of negligent homicide, the defense of assumed risk asserted by counsel for the American Universal Insurance Co. to the claims of the passengers in the Clark automobile was a proper and justifiable defense to be asserted and, if accepted by the jury in the state court action, was calculated to relieve * * * Clark of any responsibility or liability." Citing Georgia Casualty Co. v. Mann, supra, and American Surety Co. v. J. F. Schneider & Son, supra, District Judge Henry L. Brooks concluded that a finding of bad faith or negligence in the conduct of the state court action by the insurance company counsel was not justified, and that conclusion will be affirmed.

In view of this determination it is not necessary to here make disposition of the remaining issue. It deals with the determination of damages, and we observe only that it is difficult in the extreme to fathom how Clark could sustain the burden of demonstrating that he would have had better chances had the "no negligence" defense been adhered to, and if so of establishing the difference in terms of monetary damages.

Affirmed.

## APPENDIX "B"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
At Louisville

PEARL DETENBER, etc.

vs. Civil Action #4568

AMERICAN UNIVERSAL
INSURANCE COMPANY

VIOLA B. TOWNSEND, etc.

vs. Civil Action #4591

AMERICAN UNIVERSAL
INSURANCE COMPANY

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### JUDGMENT—ENTERED MARCH 9, 1965

This cause coming on to be heard on the motions of both the plaintiffs and the defendant for summary judgment, and the Court having considered the entire record, including the Transcript of the Proceedings in the Jefferson Circuit Court and the Transcript of Record in the Jefferson Circuit Court action, and having heard arguments of counsel at pre-trial conferences and having considered the various briefs filed by the respective parties, and being advised, makes the following Finds of Fact and Conclusions of Law:

1. The pleadings and the record, including the depositions and transcript of testimony, filed herein reveal that there is no issue of fact presented and that the action is one which may appropriately be disposed of by summary judgment.

2. In view of the substantial evidence of drinking on the part of American Insurance Company insured, Michael Clark, and of the introduction in evidence in the state court action of his plea of guilty to the criminal charge of negligent homicide, the defense of assumed risk asserted by counsel for the American Universal Insurance Company to the claims of the passengers in the Clark automobile was a proper and justifiable defense to be asserted and, if accepted by the jury in the state court action, was calculated to relieve American Universal Insurance Company's insured, Michael Clark, of any responsibility or liability.

3. The readiness of American Universal Insurance Company, prior to the trial of the action and at the trial of the action, to pay its policy limits and the conduct of the trial of the state court action by John A. Fulton, Counsel for American Universal Insurance Company, in a reasonably skillful, professional manner reveals that the defendant company exercised good faith in protecting the rights of its insured, Michael Clark.

4. Mr. Frank E. Haddad, Jr., a member of the Kentucky Bar and of the Bar of this Court, represented the insured, Michael Clark, personally in the state court criminal action and in the civil action, but did not participate in the trial of the civil action.

5. For the foregoing reasons and pursuant to the law of Kentucky as set forth in Georgia Casualty Co. v. Mann, 242 Ky. 447, 46 SW 2d 777, and American Surety Company of New York v. J. F. Schneider & Son, Ky., 307 SW 2d 192, it is concluded that a finding of bad faith or negligence in the conduct of the state

court action by insurance company counsel is not justified, and

IT IS, THEREFORE, ORDERED, CONSIDERED AND ADJUDGED that the motion of American Universal Insurance Company for summary judgment be, and the same is, hereby sustained, and the complaints as amended are dismissed with prejudice, and that defendant recover its costs herein expended.

Dated this 9th day of March, 1965.

/s/ Henry L. Brooks
Henry L. Brooks
United States District Judge

## APPENDIX "C"

### Federal Rules of Civil Procedure 56(c)

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.